The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Moon Construction Company

File: B-228378

Date: December 17, 1987

DIGEST

1. Since a solicitation's order of precedence clause will not necessarily protect the government where a conflict between the specifications and the drawings in a solicitation exist, a bidder's failure to acknowledge an amendment issued to resolve the conflict renders the bid nonresponsive.

2. While it is a general rule of contract interpretation that the specific provision prevails over the more general one, it is reasonable for a contracting officer to reject a bid for failure to acknowledge an amendment intended to resolve inconsistent solicitation provisions since the rule is generally utilized to resolve performance disputes arising from conflicting contract interpretations and may not be applied in the government's favor. The government should not be required to award a contract where the potential for litigation clearly exists.

DECISION

Moon Construction Company protests the award of a contract under invitation for bids (IFB) No. DAKF57-87-B-0139 issued by the Department of the Army for the repair of wood trusses at two gymnasium buildings in Fort Lewis, Washington.

We deny the protest.

Moon contends that the Army improperly rejected its low bid because Moon failed to acknowledge amendment No. 2 of the IFB. The amendment made five changes to the IFB, the following two of which the Army argues are material changes to the solicitation:

> "C. Specification Section 06100-4, Para. 7.2.1. Change Paragraph to read as follows:

> 7.2.1 Lumber: Structural lumber shall be WCLIB, dense select structure, or, for repair of broken members, comparable structural glue laminated lumber may be used. Lumber for truss test specimens shall be WCLIB select structural. All lumber shall be kiln-dried to a maximum moisture content of 12 percent. Moisture content shall not exceed 12 percent at time of installation. Each piece shall bear the grade mark of the appropriate authority.
>
> "F. Specification Section 06100, Paragraph 2.3.1 and 2.3.2: Change the moisture content to 12 percent."

The requirement in paragraph 7.2.1 was changed from dense select lumber to dense select structural lumber. The change made in paragraphs 2.3.1 and 2.3.2 was from moisture content of 19 percent and 25 percent to 12 percent. Both the Army and the protester agree that the price changes involved are insignificant. The Army states, however, that the changes in the amendment significantly affect the quality of the lumber to be used in the contract because the reduction in moisture content of the lumber and the enhanced grade of lumber required by the amendment will increase the structural integrity of the repair to the gymnasiums.

Moon argues that the amendment only clarified existing solicitation requirements and therefore Moon's failure to acknowledge the amendment should have been waived as a minor informality.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Maintenance Pace Setters, Inc., B-213595, Apr. 23, 1984, 84-1 CPD ¶ 457; Four Seasons Maintenance, Inc., B-213459, Mar. 12, 1984, 84-1 CPD ¶ 284. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery or the relative standing of the bidders. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405 (1986); Wirco, Inc., 65 Comp. Gen. 255 (1986), 86-1 CPD ¶ 103. An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation, that is, for example, it merely clarifies an existing requirement. Maintenance Pace Setters, Inc., B-213595, supra. In that case, the failure to acknowledge the amendment may be waived

and the bid may be accepted. Emmett R. Woody, B-213201, Jan. 26, 1984, 84-1 CPD ¶ 123.

With regard to the change in paragraph 7.2.1 to dense select structural lumber, that requirement appears in the original solicitation in Structural Note 1 on Drawing Sheet 1, which states "Structural lumber shall be Douglas Fir Dense Select Structural." The protester argues that the inconsistency between the drawing and the specifications is resolved under the solicitation's Order of Precedence clause, which states that other documents, exhibits, and attachments (such as the drawings) take precedence over conflicting provisions in the specifications. See Bristol Electronics, B-191449, Aug. 4, 1978, 78-2 CPD ¶ 88. Therefore, even without amendment No. 2, a bidder would be obligated to use dense select structural lumber, the protester asserts.

We do not agree. The Order of Precedence clause would not necessarily protect the government from the inconsistency between the specifications and the drawing should a dispute arise during contract performance, because factual issues concerning the government's and the contractor's knowledge of the inconsistency prior to award would have to be resolved. See Sommers Building Company, Inc. ASBCA No. 32232, 86-3 BCA ¶ 19223; See also Action Manufacturing Company, ASBCA No. 23773, 81-2 BCA ¶ 15239. Since the government had actual knowledge of the discrepancy, it properly sought to resolve it through an amendment to the solicitation. See,e.g., Sommers Building Company, Inc., supra. In our view, then, the amendment was material and Moon's failure to acknowledge render its bid nonresponsive.

The change made in amendment No. 2 to the moisture content of the lumber is not governed by the Order of Precedence clause because the affected sections are in the same category, the specifications. We also find that changes made in amendment No. 2 were material in this instance. Paragraph 2.3.1 and 2.3.2 were under Section 06100, Part 1 "General," Section 2 "General Requirements," subsection 2.3. "Moisture Content," and stated that lumber two inches or less thick shall be of 19 percent maximum moisture content and lumber over 2 inches thick shall be of 25 percent maximum moisture content. On the other hand, paragraph 7.2.1 was included in section 06100, part 3 "Execution," section 7 "Rough Carpentry - Truss Repair and Truss Test Specimens," subsection 7.2 "Materials." Section 7.2.1 described specifically the type of lumber and treatment, and stated twice that it "shall be dried to a maximum moisture content of 12 percent."

The protester argues that the amendment is not material in this respect because it is a general rule that when a

contract contains conflicting provisions which cannot be reconciled, an attempt should be made to determine which of the provisions should be made effective, rejecting the other, in order to carry out the purpose and intention of the parties. Total Leonard Inc., 56 Comp. Gen. 307 (1977), 77-1 CPD ¶ 62. In such a case, a specific provision will prevail when there is a conflict between that provision and a more general one. Donald W. Close Co., 58 Comp. Gen. 297 (1979), 79-1 CPD ¶ 134. Under this rule, the protester asserts, the more specific paragraph 7.2.1 would prevail over the more general, inconsistent paragraph.

The above noted rule of contract interpretation is generally utilized to resolve performance disputes resulting from conflicting contract interpretations, and while the rule is generally recognized, there is no assurance that a forum will not find other factors that influence its decision in a manner detrimental to the government. See generally, Franchi Construction Company, Inc., 609 F.2d 984, 989 (Ct. Cl. 1979). Thus, while the government may prevail should the issue be forced to litigation, the government should not be required to enter into a contract where such a possibility exists. The amendment thus became a critical factor in resolving a potential conflict on this issue also, and we think it was reasonable for the contracting officer to reject the bid for failure to acknowledge it.

The protest is denied.

for James F. Hinchman
General Counsel